

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeals of)
JOHN AND ELVIRA C! . COSTA,)
MARIANO AND ANTOINETTE COSTA,)
ANNA COSTA, AND DOM-AND MARY COSTA)

For Appellants: Robert M. Himrod
Attorney at Law

For Respondent: Crawford H. Thomas
Chief Counsel

Lawrence C. Counts
Associate Tax Counsel

O P I N I O N

These appeals are made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on protests against proposed assessments of additional personal income tax and penalty as follows:

<u>Appellant</u>	<u>Year</u>	<u>Tax</u>	<u>Penalty</u>
John and Elvira C. Costa	1960	8 856.83	\$ 0.00
Mariano and Antoinette Costa	1960	487.92	0.00
Dom and Mary Costa	1960	777.14	0.00
Anna Costa	1960	1,071.66	53.58

The primary issue presented is whether appellants are entitled to the benefits of section 17402 of the Revenue and Taxation Code relative to the recognition of gain on the liquidation of a corporation,,

Appellants are the former shareholders of Costa and Sons, Inc., a family-owned, domestic corporation which was dissolved pursuant to a plan of liquidation adopted on September 16, 1960. Within 30 days after adopting the plan,

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written elections were filed with the Internal Revenue Service under section 333 of the Internal Revenue Code and appellants thereby qualified for the special tax treatment provided by the federal statute, .

Section 17402 is substantially the same as section 333 of the Internal Revenue Code. In order to qualify for the benefits provided therein, section 17402 requires the filing of written elections "within 30 days after the date of the adoption of the plan of liquidation."

Having received no document purporting to be an election under section 17402, respondent determined that appellants had not-qualified under that section and issued proposed assessments. However,, appellants argue that there was substantial compliance with the aforementioned code section. They point to the fact that on September 21, 1960, the corporation filed with the Secretary of State a Certificate of Election to Wind up and Dissolve. The certificate indicated that the corporation was being liquidated and that appellants had elected to be governed by section 333 of the Internal Revenue Code. The certificate, however, did not indicate any intention on the part of appellants to make an election under section 17402 and, furthermore, a copy was never filed with the Franchise Tax Board.

The only-other document filed within the 30-day period was an Assumption of Tax Liability submitted September 29, 1960, to the Franchise Tax Board on behalf of the corporation. This document did not indicate that the corporation was to be liquidated within 30 days after September 16, 1960, nor that appellants elected to have their liquidation distribution gains governed by *section* 17402.

We do not think that appellants have shown that they complied with the election requirements of section 17402. Neither the Certificate of Election to Wind up and Dissolve filed with the Secretary of State nor the Assumption of Tax Liability filed with the Franchise Tax Board purported to be an election concerning the manner in which any particular shareholder would treat gain realized on the liquidation of the corporation.

Here we are dealing with statutory language which is clear and unequivocal. The statute is inapplicable unless elections are made in accordance with the statutory terms, (M. H. Kelley, T.C. Memo., Dkt. Nos. 22356, 22357, 22360, 22351, Feb. 13, 1961; Ralph D. Lambert, T. C. Memo., Dkt. Nos. 2071-62, 2080-62, 2081-62, October 29, 1963; Virginia E. Ragen, 33 T. C. 706.) Respondent's regulations with respect to section 17402

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specifically provide that "Under no circumstances shall Section 17402 be applicable to any shareholders who fail to file their elections within the 30-day period prescribed." (Cal. Admin. Code, tit. 18, reg. 17402(c).) Therefore, since none of the shareholders filed anything purporting to be an election under section 17402, we must sustain respondent's action.

Late in the proceedings and by way of their reply brief, appellants raised the contention that a credit should be given to them for depreciation if respondent's position is sustained, because they would then be entitled to have a stepped-up basis for buildings which constituted the major assets of the dissolved corporation. Appellants have not shown, however, how much depreciation they would be entitled to for the year in question. Consequently, we are unable to make any adjustments. In any event, the amount would appear to be nominal since the corporation was dissolved toward the end of 1960.

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protests against proposed assessments of additional personal income tax and penalty as follows, be and the same is hereby sustained:

<u>Appellant</u>	<u>Year</u>	<u>Tax</u>	<u>Penalty</u>
John and Elvira C. Costa	1960	\$ 856.83	\$ 0.00
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Done at Sacramento., California, this 7th day
of March ,1967, by the State Board of Equalization.

Paul R. Leach, Chairman
John W. Lynch, Member
Robert H. Dean, Member
Geoffrey H. Keisler, Member
_____, Member

ATTEST: W. H. Hearn, Secretary